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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 563

YOR-WAY MARKETS, a corporation, and E. W. KENNEDY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Supreme Court of the United States:

The above-named petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California rendered and entered May 20, 1960, and numbered therein as L. A. 25754, and in support of such petition, petitioners allege:

I.

Citations of Opinions of State Courts.

The opinion of the Supreme Court of the State of California as to which a review is sought was rendered on May 20, 1960, and is reported in Vol. 54 Advanced California Reports. (No. 7 issued June 3, 1960.)[1] An

[1]Cited as 54 A. C. 210; also reported in 352 P. 2d 519; See Appendix p. 24.

earlier opinion written by the District Court of Appeal of the State of California reached a contrary result to that announced by the state Supreme Court. This other opinion was dated December 9, 1959, and is reported in Vol. 176, Advanced California Reports, at page 688.[2] Copies of each of these opinions are set forth in the appendix to this petition.

II.

The Final Judgment of the State Court.

The original judgment was one in condemnation rendered by the Superior Court of the State of California, in and for the County of Los Angeles,[3] on January 14, 1959, and entered on January 16, 1959. The above mentioned decision of the State Supreme Court, dated May 20, 1960, now constitutes the final judgment of record. Following the decision by the Supreme Court, and within the fifteen days permitted by Rule 27 of that Court's Rules on Appeal, petitioners petitioned for a rehearing in which they again urged that the taking of their property without compensation violated the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This petition for rehearing was denied by the state Supreme Court, without opinion, on June 14, 1960, thereby leaving no further remedies available to petitioners in the state courts.

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[2]Cited as 176 A. C. A. 76. Also reported in 1 Cal. Rep. 107; See Appendix P. 13.

[3]The Trial Court.

III.

Statute Conferring Jurisdiction to Review.

The section which appears to confer jurisdiction to review this decision is Section 1257(3) of Title 28, United States Code.[1] This section permits certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States. In this instance petitioners contend that the State of California in this condemnation action has deprived them of property in violation of the rights guaranteed by the Fourteenth Amendment to the United States Constitution.

IV.

Questions Presented for Review.

The questions presented for review are:

Is a property owner of property adjoining a highway entitled to compensation for the damage suffered by reason of the changes in the highway which bar ingress and egress to traffic traveling in one direction, and which permits ingress and egress to traffic traveling in the opposite direction?

Is such property owner entitled to his day in court to show that there was no necessity for thus changing the highway so as to bar access to one half of the highway, or is the *ex parte* determination of the highway department on the propriety of thus dividing the highway conclusive?

---

[1] 62 Statute 929, 28 U. S. C. A. 1257(3).

Statement of the Case.

Petitioners are the owners of a leasehold on a piece of property on the northwest corner of the intersection of Azusa Avenue and First Street in the City of Azusa, California. [Rep. Tr. p. 47, lines 18 to 22.] The property has a frontage of 200 feet along Azusa Avenue and 140 feet along First Street. This property is improved with a building consisting of a retail grocery supermarket, which petitioners operate, and an adjoining parking lot. The building extends 140 feet along First Street and 90 feet along Azusa Avenue. Extending along the north edge of the building is an elevated strip 10 feet wide, used as an entranceway. Substantially, all of the area north of that is parking space.

The respondent is taking by condemnation a strip of the land 10 feet wide extending along the entire Azusa Avenue frontage. [Rep. Tr. p. 9.] In connection with this taking, Azusa Avenue in front of the property will be radically changed as described hereafter. We are embodying as Exhibits A and B to this petition, photostats of the maps of the area used in evidence at the trial. Exhibit A shows the area before the change and Exhibit B shows the area after the change.

Prior to the taking and the change, traffic on Azusa Avenue in front of the property could proceed in two directions; north and south. The only substantial entrances to the parking lot were on Azusa Avenue. Except for the raised divider to be constructed as hereinafter described, there is no obstruction which would prevent traffic northbound on Azusa Avenue from turning left in front of the parking lot and entering at the entrances north of First Street. [Rep. Tr. p. 15, lines 8 to 10.] In connection with the taking of the ten foot strip, a connect-

ing road will be constructed between Azusa Avenue and San Gabriel Avenue, the parallel street west. This connecting road will travel in a generally southeasterly direction and will carry southbound traffic from San Gabriel to the intersection of Azusa Avenue and First Street. [Rep. Tr. p. 15, line 8, to p. 16, line 20.] A raised divider will be installed on Azusa Avenue, beginning at the intersection of First Street, and extending in a northerly direction to require traffic on Azusa from that point to travel only in a northerly direction. [Rep. Tr. p. 17, line 23 to p. 22, line 4; p. 29, lines 7 to 10.] Although southbound traffic on the connecting road has access to the property, this obstruction will deny one-half of the access which petitioners had previously by preventing all vehicles travelling in a northerly direction on Azusa Avenue from turning into the parking lot.

The damages arising from the actual taking of the easterly ten foot strip of the property, and the severance damage to the remaining property, were determined by stipulation of the parties in advance of the trial. [Clk. Tr. p. 58.] The stipulation left open the question of petitioners' right to recover damages resulting from the installation of the divider which prevented access to and from the northbound lanes of traffic, and the trial court refused to allow petitioners to introduce any evidence on the damages which would be suffered because of this. [Rep. Tr. pp. 41 and 73.]

Federal Question Urged From the Inception.

Beginning in the trial court, the petitioners urged that the refusal to give them damages was a violation of the rights guaranteed by the United States Constitution. [Rep. Tr. p. 52, line 15.]

Thereafter, in their first brief filed on appeal, the petitioners presented the Federal question as their main contentions on appeal. This is set out on page 5 of Appellants' Opening Brief as follows:

> "2. It is a deprivation of property without due process of law to materially curtail access to appellants' market by the construction of a divider which diverts northbound traffic on one of the streets.
>
> There have been decisions in this state which have indicated that the type of damage resulting from the above mentioned wrongs flows from an exercise of the police power, and it is, therefore, damage which is not recoverable. We do not believe that these decisions are in accord with the general rule in this country, and we believe that the rule embodied in those decisions is in contravention with the Fourteenth Amendment of the United States Constitution and of Article I, Section 14 of the California Constitution."

Finally, in their petition for rehearing, petitioners again urged the Federal question of deprivation of property without due process of law as follows:

> "The decision of the Court violates the guarantees of the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 14 of the California Constitution. . . . Both in the trial court (Rep. Tr. p. 52, line 15) and in their opening brief before the District Court of Appeal, appellants have raised the objection that a failure to award them the damages sought, over the amounts provided in the stipulation, would violate the Fourteenth Amendment. As yet, neither the trial court nor this honor-

able Court has ruled on this contention, except that by implication, they necessarily denied the contention. . . . The Fourteenth Amendment provides in part that no person shall be deprived of life, liberty or property without due process of law. The property right of any person in a piece of real property is so intrinsically interwoven with his right to use it that without access to that property his ownership is valueless. By the same token, his property right and use of the property continues only so long as his right of access continues. Once he is deprived of this right, either by its being taken completely or being substantially impaired, he has been deprived of property."

"In addition to the denial of due process in refusing to award damages, appellants were denied due process in not being afforded a hearing on these matters. The trial court refused to admit any evidence concerning these elements of damage, and appellants therefore have been deprived of valuable property without any hearing guaranteed by the Constitution of both the United States and the State of California."

Reasons for Granting Petition.

The program of road building and road improving throughout the country has affected the property rights of untold numbers of persons. Especially due to the program of building freeways or express highways, the problems concerning access to property are of vital importance, not only to condemning bodies, but especially to the great number of property owners affected by these activities.

That this is a vital problem was recognized by this court in *Martin v. Creasy*,[1] in which the question of access was involved. In that case this court held that the property owners should first exhaust their state remedies, and at page 225 stated:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here."

Petitioners herein have exhausted their state remedies. They have been severely damaged by the action of the state and their rights, as well as the rights of the great many other persons affected by similar problems, should be reviewed.

One of the most vital points urged by petitioners is that they have been denied any hearing in connection with the issues raised in this petition. As pointed out, the trial court refused to hear any evidence concerning these changes which would affect access so drastically. The only basis on which respondent can justify its action without giving compensation is that this is an exercise of the police power. [Rep. Tr. p. 72, lines 5 to 13.] But this Court should clarify the question as to whether a condemning body can prevent a person from having a hearing by using the magic words "police power", or whether a person deprived of a valuable property right can have his day in court, at least to show an improper or unnecessary exercise of the police power.

This case, it is submitted, would be an ideal case for review since the issues presented arose on a refusal to

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[1] 360 U. S. 222, 79 S. Ct. 1034.

hear evidence. Not only would the question of a right to a hearing be presented, but, in addition, the other issues would be presented squarely as questions of law not complicated by determinations of factual matters.

In addition to the number of people affected by this case, certiorari should be granted because there is a conflict between the California Supreme Court decision in this matter, and a decision of a Court of Appeals[1] in which it was held that the depriving of access to property was a matter for which compensation must be given. It has been pointed out that a conflict between a Court of Appeals and the highest court of a state is a reason for granting certiorari.[2]

That access to property is a right of which a person cannot be deprived without compensation, was indicated by this court in *Martin v. Creasy* (*supra*), so held directly in *Creasy v. Martin*,[3] and in *Donovan v. Pennsylvania Co.*[4] the rule that the right of access is an intrinsic part of property was stated at page 302 and 303 with a quotation from Dillon on Municipal Corporations as follows:

> "The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. . . . When he is deprived of such right of access, or of any other easement connected

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[1]*Schiefelbein v. United States*, 124 F. 2d 945; *Union Electric Light & Power Co. v. Snyder Estate Co.* (1933), 65 F. 2d 297.

[2]Supreme Court Practice—Stern & Gressman, pp. 117 and 118.

[3]160 Fed. Supp. 404, reversed by *Martin v. Creasy* (*supra*) on the ground that state remedies should be exhausted.

[4]179 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192.

with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

Conclusion.

This court has had occasion to hold that shooting a cannon[1] and flying airplanes[2] over property was a taking entitling the owner to compensation. With the advent of the tremendous expansion of highways it is earnestly submitted that this very complex question of damages to access is of so much more significance that it should be reviewed at this time.

It is urged with equal earnestness that this particular case presents these problems in such a clear-cut and distinct manner that a review by this court will lay at rest the many uncertain questions now plaguing not only the property owners, but also the governmental authorities so interested in providing better highways.

Respectfully submitted,

JOSEPH M. McLAUGHLIN,
Attorney for Petitioner.

JAMES A. McLAUGHLIN,
LAWRENCE P. CASEY,
Of Counsel.

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[1] *Portsmouth Co. v. United States*, 260 U. S. 327, 67 L. Ed. 287, 43 S. Ct. 135.

[2] *United States v. Causby*, 328 U. S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062.

APPENDIX.

In the Superior Court of the State of California, in and for the County of Los Angeles.

The People of the State of California, acting by and through the Department of Public Works, Plaintiff, vs. Cornelius L. Ayon as Administrator, *et al.*, Defendants.

No. 697076

Parcel 5.

Findings of Fact and Conclusions of Law.

This cause for the condemnation in fee simple absolute for a State highway for freeway purposes of the real property and interests in real property situated in the County of Los Angeles, State of California, and more particularly described in plaintiff's complaint on file herein as Parcel 5 came on regularly for trial on December 29, 1958, in Department 52 of the above-entitled court, before the Honorable J. F. Moroney, Judge of the Superior Court, without the intervention of a jury, a jury and notice of entry of judgment having been waived, upon the complaint of plaintiff and the answer of defendants Harold J. Fry, also known as Harold Joseph Fry, Marion H. Fry and John V. Fry, also known as John Vernon Fry, and the answer of defendant Yor-Way Markets, a corporation, having answered herein as Doe One, and the answer of defendant County of Los Angeles, a body politic and corporate.

The action was dismissed as to defendant Marjorie Fry.

George C. Hadley, by W. H. Peterson and Donald J. Drew, appeared as attorneys for plaintiff; John A. Welborn appeared as attorney for defendants Harold J. Fry, Marion H. Fry and John V. Fry; McLaughlin & Casey by James A. McLaughlin and Lawrence P. Casey appeared

as attorneys for defendant Yor-Way Markets, a corporation; Harold W. Kennedy by Terry C. Smith appeared as attorney for defendant County of Los Angeles, a body politic and corporate.

Witnesses on the part of plaintiff and defendants were sworn in the case and evidence, both oral and documentary, including a stipulation as to the fair market value of Parcel 5 and severance damages to defendants' remaining property of which Parcel 5 was a part, was introduced upon the issues.

The case was argued by counsel for the respective parties;

And the Court, upon the evidence, pleadings, stipulations of counsel, and GOOD CAUSE APPEARING THEREFOR, hereby makes and files the following as required by the statutes in such cases made and provided:

FINDINGS OF FACT

I.

The Court finds that this action was regularly commenced by plaintiff on March 10, 1958, by the filing of its complaint and issuance of summons in the proper county to condemn the real property and interests in real property described in plaintiff's complaint as Parcel 5.

II.

It further appears to the Court and is expressly found that the use and purposes for which said parcel of real property is sought to be condemned is a public use authorized by law, to wit, for a State highway for freeway purposes, and that the taking of said real property in fee simple absolute for said purposes was and is necessary to such public use and purposes.

III.

The Court finds that each and every matter, fact and thing stated and set forth in the resolution of the California Highway Commission referred to in paragraph II of plaintiff's complaint was and is true, and that the public interest and necessity require the acquisition of Parcel 5 in fee simple absolute for a State highway for freeway purposes.

IV.

The Court finds that the allegations set forth in the answers of defendants Harold J. Fry, Marion H. Fry and John V. Fry, and Yor-Way Markets, a corporation, relating to the value of the real property sought to be condemned by plaintiff are untrue to the extent that said allegations are in excess of what is herein found to be the fact; that the allegations in said answers relating to severance damages are untrue to the extent that said allegations are in excess of what is herein found to be the fact.

V.

The Court finds that defendant E. W. Kennedy, sued and served herein as Doe One was duly and regularly served with copies of plaintiff's summons and complaint in this proceeding; that the time allowed by law for such appearance has expired and the plaintiff has requested entry of and default has been duly made and entered against said defendant, pursuant to the statutes provided.

VI.

The Court finds that the property sought to be condemned herein and described in plaintiff's complaint as Parcel 5 is owned by defendants Harold J. Fry, Marion H. Fry and John V. Fry.

VII.

The Court finds that defendant E. W. Kennedy, sued and served herein as Doe One has no compensable interest in and to Parcel 5 and is not entitled to any compensation herein.

VIII.

The Court finds that defendant County of Los Angeles has an interest in and to said Parcel 5 by virtue of a lien for taxes in the sum of $5.83.

IX.

The Court finds that defendant Yor-Way Markets, alleged to be a corporation of which defendant E. W. Kennedy is president, has an interest in Parcel 5 as a partial sub-lessee.

X.

The Court finds that plaintiff and defendants entered into a written stipulation, dated December 15, 1958, and on file herein, that the fair market value of Parcel 5, together with all improvements thereon, and the severance damage to the remainder, by reason of the taking of Parcel 5, and the construction of the improvement in the manner proposed is the sum of $5,800.00.

XI.

The Court finds, pursuant to the aforesaid stipulation, that the fair market value of Parcel 5 and all improvements thereon pertaining to the realty, and the severance damage to the remainder by reason of the taking of Parcel 5 and the construction of the improvement in the manner proposed is the total sum of $5,800.00.

Upon the foregoing facts the Court makes the following:

CONCLUSIONS OF LAW

I.

That plaintiff is entitled to a judgment in condemnation decreeing that upon payment into court for the benefit of defendants Harold J. Fry, Marion H. Fry, John V. Fry, Yor-Way Markets, a corporation, and County of Los Angeles, a body politic and corporate, of the sum of Five Thousand Eight Hundred and 00/100 Dollars ($5,800.00), said sum to be distributed as follows:

1. To defendant County of Los Angeles, a body politic and corporate, the sum of $5.83;
2. To defendants Harold J. Fry, Marion H. Fry, John V. Fry, and Yor-Way Markets, a corporation, as their interests may appear, the balance of said sum,

there shall be condemned in fee simple absolute to plaintiff as against defendants Harold J. Fry, also known as Harold Joseph Fry, Marion H. Fry, John V. Fry, also known as John Vernon Fry, Yor-Way Markets, a corporation, County of Los Angeles, a body politic and corporate, and E. W. Kennedy, for the use and purposes set forth in said complaint, to wit, for a State highway for freeway purposes, the real property and interests in real property described in plaintiff's complaint as Parcel 5, together with any and all improvements thereon pertaining to the realty.

II.

That the payment into court of the said total sum of money as hereinabove specified shall be in full payment for the real property and interests in real property so taken in fee simple absolute, together with any and all improvements thereon pertaining to the realty, and for all dam-

agc s of every kind and nature suffered by said defendants by reason of the taking of said real property and interests in real property and the construction of the improvement in the manner proposed by plaintiff, and shall terminate, cancel and extinguish as to Parcel 5 only, all taxes, liens, leaseholds and encumbrances of whatsoever kind and nature on said Parcel 5.

III.

That defendants Harold J. Fry, Marion H. Fry and John V. Fry, and Yor-Way Markets, a corporation, and County of Los Angeles, a body politic and corporate, are entitled to their costs of suit incurred herein.

Dated: January 14, 1959.

J. F. MORONEY,

Judge of the Superior Court.

In the Superior Court of the State of California, in and for the County of Los Angeles.

The People of the State of California, acting by and through the Department of Public Works, Plaintiff, vs. Cornelius L. Ayon as Administrator *et al.*, Defendants. No. 697076.

Parcel 5.

Judgement in Condemnation.

Upon the Findings of Fact and Conclusions of Law on file herein, and GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that upon payment into court for the benefit of defendants Harold J. Fry, Marion H. Fry, John V. Fry, YorWay Markets, a corporation, and County of Los Angeles, a body politic and corporate, of the sum of Five Thousand Eight Hundred and 00/100 Dollars ($5,800.00), said sum to be distributed as follows:

1. To defendant County of Los Angeles, a body politic and corporate, the sum of $5.83;
2. To defendants Harold J. Fry, Marion H. Fry, John V. Fry, and YorWay Markets, a corporation, as their interests may appear, the balance of said sum;

there shall be condemned in fee simple absolute to plaintiff as against defendants Harold J. Fry, also known as Harold Joseph Fry, Marion H. Fry, John V. Fry, also known as John Vernon Fry, Yor-Way Markets, a corpora-

tion, County of Los Angeles, a body politic and corporate, and E. W. Kennedy, for the use and purposes set forth in plaintiff's complaint, to wit, for a State highway for freeway purposes, the real property and interests in real property described in plaintiff's complaint as Parcel 5, together with any and all improvements thereon pertaining to the realty.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the use for which said real property and interests in real property are sought to be condemned is a public use authorized by law, to wit, for a State highway for freeway purposes, and that the taking of said real property and interests in real property is necessary for such public use and purposes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the payment into court of the said total sum of money as hereinabove specified shall be in full payment for the real property and interests in real property so taken in fee simple absolute, together with any and all improvements thereon pertaining to the realty, and for all damages of every kind and nature suffered by said defendants by reason of the taking of said real property and interests in real property and the construction of the improvement in the manner proposed by plaintiff, and shall terminate, cancel and extinguish as to Parcel 5 only, all taxes, liens, leaseholds and encumbrances of whatsoever kind and nature on said Parcel 5.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants do have and recover of and from plaintiff their costs of suit incurred herein as follows:

1. Defendants Harold J. Fry, Marion H. Fry and John V. Fry, in the sum of $25.00 claimed by Harold Fry and John Fry.
2. Defendant Yor-Way Markets, a corporation, in the sum of $26.00.
3. Defendant County of Los Angeles, a body politic and corporate, in the sum of $.....

Dated: January 14, 1959.

J. F. MORONEY,
Judge of the Superior Court.

In the Superior Court of the State of California, in and for the County of Los Angeles.

The People of the State of California, acting by and through the Department of Public Works, Plaintiff, vs. Cornelius L. Ayon as Administrator, *et al.*, Defendants. No. 697076.

Parcel 5.

Final Order of Condemnation.

The plaintiff in the above-entitled proceeding having paid into court for the benefit of defendants Harold J. Fry, Marion H. Fry, John V. Fry, Yor-Way Markets, a corporation, and County of Los Angeles, a body politic and corporate, the total amount of compensation awarded by the Court for the interests of defendants Harold J. Fry, also known as Harold Joseph Fry; Marion H. Fry, John V. Fry, also known as John Vernon Fry, Yor-Way Markets, a corporation, County of Los Angeles, a body politic and corporate, and E. W. Kennedy, in and to the parcel of real property described in plaintiff's complaint as Parcel 5, together with any and all improvements thereon pertaining to the realty, and for all damages of every kind and nature suffered by said defendants by reason of the taking of said real property and interests in real property and the construction of the improvement in the manner proposed by plaintiff:

Now, Therefore, it is Hereby Ordered that the following described parcel of real property be, and it is hereby, condemned in fee simple absolute to become the prop-

erty of plaintiff for the use and purposes set forth in plaintiff's complaint, to wit, for a State highway for freeway purposes, the said real property being situate in the County of Los Angeles, State of California, and more particularly described as follows:

PARCEL 5

For State highway purposes, the easterly 10.00 feet of Lots 16 to 19, inclusive, in Block 76 of City of Azusa, in the City of Azusa, County of Los Angeles, as shown on map recorded in Book 15, pages 93 to 96, inclusive, of Miscellaneous Records, in the office of the County Recorder of said County.

Containing 2,000 square feet.

IT IS FURTHER ORDERED that the total sum paid into court pursuant to judgment in eminent domain as to the parcel of real property described in plaintiff's complaint as Parcel 5, to wit, the sum of Five Thousand Eight Hundred and 00 100 Dollars ($5,800.00) shall be distributed as follows:

1. To defendant County of Los Angeles, a body politic and corporate, the sum of $5.83;
2. To defendants Harold J. Fry, Marion H. Fry, John V. Fry, and Yor-Way Markets, a corporation, as their interests may appear, the balance of said sum;

and the Clerk and Auditor are hereby directed to cause warrants to be drawn on the County Treasurer for said sums, and the Treasurer is directed to pay the same.

IT IS FURTHER ORDERED that a copy of this order and judgment be filed in the office of the County Recorder of the County of Los Angeles, State of California, and thereupon the real property and interests in real property hereinabove described, together with any and all improvements thereon pertaining to the realty, and the title thereto shall vest in plaintiff in fee simple absolute, and that there be terminated canceled and extinguished as to Parcel 5 only, all taxes, liens, leaseholds and encumbrances, of whatsoever kind and nature on said Parcel 5.

Dated: January 27, 1959.

CLINTON F. RODDA,
Judge of the Superior Court
Pro Tempore

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California acting by and through the Department of Public Works, Plaintiff and Respondent, vs. Cornelius L. Ayon as Administrator of the Estate of Cornelius Fraijo Ayon, deceased, *et al.*, Defendants, Yor-Way Markets, a Corporation, and E. W. Kennedy, Appellants. Civil No. 23921.

Filed December 9, 1959.

Appeal from judgment and order of condemnation of the Superior Court of Los Angeles County, J. F. Moroney, Judge; Clinton Rodda, Judge Pro Tem. Reversed.

For Appellants: McLaughlin & Casey.

For Respondent: George C. Hadley; W. H. Peterson; Charles E. Spencer, Jr.

Eminent domain. Defendants Kennedy and Yor-Way Markets appeal. They are lessee and sub-lessee, respectively, of a parcel of land in the City of Azusa, situated on the northwest corner of Azusa Avenue and First Street, having 200 feet of frontage on Azusa and 140 feet on First Street. The east ten feet of the property is being condemned. The property is used as a supermarket with adjoining parking space. The customers' entrance to the building is inside the parking lot on the north side of the building and the automobile entrances are on Azusa.

Azusa runs north and south and First Street east and west. The next street to the north is Second Street, at a distance of approximately 900 feet. To the west the first street parallel with Azusa Avenue is San Gabriel Avenue, some 340 feet away. Traffic moves north and south on both of the last mentioned streets. The condemnation is

for the purpose of opening a new (unnamed) state highway extending in a general southeast direction from Second and San Gabriel to First and Azusa and thence due south. The construction is such that the new highway and Azusa at a point some 400 feet north of First would merge except for the fact that they are separated by a divider, 6 inches high, 5 feet wide at the southerly end and widening to 16 feet at its north end. A part of the state's plan is to convert Azusa to a one-way street with travel to the north and San Gabriel to a southbound artery; the new state highway will accommodate southbound traffic only. The layout of streets before and after condemnation is shown by maps received in evidence as exhibits 3 and 4. While a customer of Yor-Way Markets can enter at grade from the parking lot into the new street he must go south to First, then turn east on First and left on Azusa if he would travel the nearest route to the north. In order to reach the market customers coming from points south of First Street and traveling north on Azusa must go north to Second Street, west to the new state highway, and south on it to defendants' parking lot, or, as an alternative, turn west on First Street to an alley at the rear of the property and enter through a narrow delivery entrance. In order to accomplish these results Azusa is narrowed from a 47-foot width, curb to curb, to 32 feet for a considerable distance north of First. And the new artery, width of 40 feet, intervenes between the front of defendants' property and Azusa Avenue; direct access to Azusa is thus cut off.

Counsel for respondent and appellants entered into a stipulation "that the fair market value of Parcel 15 [appellants' property] together with all improvements thereon and the severance damage to the remainder by reason of

the taking of Parcel 5 and the construction of the improvement in the manner proposed is the total sum of Five Thousand, Eight Hundred and 00/100 Dollars ($5,800.00). This stipulation is made without prejudice to defendant Yor-Way Markets' right to offer evidence concerning purported elements of damage involving loss of business, customers and good will by reason of the construction of the improvement in the manner proposed, and without prejudice to the right of plaintiff or the other defendants to object to such offer." This stipulation was accepted by the court, the damages for taking and severance were fixed at $5,800 and the trial proceeded upon the issue of whether defendants were entitled to additional severance damage because of interference with their right of access to their property. In the trial court and upon appeal counsel for appellants stress diversion or circuity of traffic and business losses as the bases of their claim to an additional award. But they also relied in the trial court, as they do here, upon People v. Ricciardi, 23 Cal. 2d 390, and similar cases; same were discussed by opposing counsel and the court, which sustained objections to defendants' proffered evidence upon impairment of access. Though counsel for appellants stressed noncompensable items of damage, they also made the broader claim suggested by the Ricciardi case, *supra*, and we conclude that that broad question is before us—whether any compensable damage to the right of access is shown by the record.

The right of ingress and egress to and from an owner's property, commonly referred to as the right of access, is recognized as an easement attached to the land. (City of San Mateo v. Railroad Com., 9 Cal. 2d 1, 11; Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 33; McCandless v. City of Los Angeles, 214 Cal. 67, 71; Rose v. State of

California, 19 Cal. 2d 713, 727-728; Bacich v. Board of Control, 23 Cal. 2d 343, 350; Beals v. City of Los Angeles, 23 Cal. 2d 381, 384; People v. Ricciardi, *supra*, 23 Cal. 2d 390, 397-398.) It is a right of *direct* access (People v. Ricciardi, *supra*, p. 399). The cul-de-sac cases (Bacich v. Board of Control, *supra*, pp. 352-353; Beals v. City of Los Angeles, *supra*, p. 384) say that it embraces access to the next intersecting street in both directions. It also "includes a certain convenience in the use of his property with respect to the rest of the world, such as the opportunity for a man's customers to come to his place of business without unreasonable hindrance or interruption. It includes not merely the right of the abutting owner to go into and come out of his premises but also the right to have the premises accessible to patrons, clients, and customers." (McQuillin on Municipal Corporations (2d Ed.), Vol. 4, Ch. 30 §1429, p. 116.) See, also, 64 C. J. S., §1703, pp. 101-102. This grows out of the basic rule that the "extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted." (Bacich v. Board of Control, *supra*, p. 352.) Any substantial interference with the exercise of this easement by a public agency constitutes a compensable taking. (Rose v. State of California, *supra*, p. 729; McCandless v. City of Los Angeles, *supra*, p. 71.)

The police power, rather than the law of eminent domain, embraces and sanctions, without compensation made, the mere re-routing of traffic whether that be through construction of a divider in the center of the street bounding a given property (Holman v. State of California, 97 Cal. App. 2d 237, 244; People v. Sayig, 101 Cal. App. 2d 890, 893), or requiring that all traffic on the street proceed in one direction only (Beckham v. City of Stock-

ton, 64 Cal. App. 2d 487, 502), or creating other types of diversion or circuity of travel (People v. Ricciardi, *supra*, p. 396; People v. Russell, 48 Cal. 2d 189, 195; Beckham v. City of Stockton, *supra*, p. 502; Rose v. State of California, *supra*, p. 741; Holman v. State of California, *supra*, p. 244). Likewise, mere interference with the business of an adjoining owner is not compensable (People v. Ricciardi, *supra*, p. 396; County of L. A. v. Pan American Dev. Corp., 146 Cal. App. 2d 15, 19; Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 398).

The rules just mentioned are not absolutes, however. Concerning interference with the existing flow of travel, Bacich v. Board of Control, *supra*, says at page 355: "In any event, the phrase 'circuity of travel' has varied meanings and is frequently misused by the courts. There is more than merely a diversion of traffic when a cul-de-sac is created. The ability to travel to and from the property to the general system of streets in one direction is lost." People v. Ricciardi, *supra*, at page 403: "To sustain the plaintiff's position would require a ruling by this court to the effect that although a landowner's easement of access has been substantially impaired, under no circumstances should circuity of travel occasioned thereby enter into a computation of the damages to be awarded. Such a ruling obviously would be beyond the bounds of propriety."

Where there is a taking an interference with use of the remainder for business purposes may enter necessarily into determination of the severance damage, not as a separate item but as an inescapable element of measurement of impairment of the value of the remainder. This follows from recognition of the right of the condemnee "to have the premises accessible to patrons, clients, and customers." (McQuillin on Municipal Corporations, *su-*

pra, p. 117.) The same author says, in paragraph 1489, at page 245: "In fact, the general rule may be said to be that if an encroachment or other improper use of the street by an adjoining owner, an owner across the street, or others, materially interferes with prospective customers as to their ingress or egress from plaintiff's place of business or their view of shop windows, plaintiff is specially injured so as to be entitled to sue." In the Oakland case, *supra* (171 Cal. 392), the court observed at page 398: "Indeed, this is but another way of phrasing the real contention of appellant, as quoted above from its brief, that business is property, and when the taking by the state or its agencies interferes with, impairs, damages, or destroys a business, compensation may be recovered therefor. We are not to be understood as saying that this should not be the law when we do say that it is not our law." It seems apparent that if conduct of a supermarket be the highest and best use of the condemned premises the effect of the taking upon the remaining parcel will be influenced strongly by the fact that it renders that remaining parcel less valuable for business purposes,—not the past experience of the owner is to be considered, but the impact upon the market value of the portion not taken when considered with respect to its highest and best use.

It has been shown above that Azusa Avenue, which bounds the condemned parcel on the east, has been shifted further east some 40 feet, the new state highway now intervenes between the condemnees' property and the street upon which it formerly abutted and direct access to Azusa Avenue has been destroyed. This case is governed by People v. Ricciardi, *supra*.

That was an action for condemnation of a portion of defendants' property located at the northeast corner of

Rosemead and Ramona Boulevards, in Los Angeles County. Rosemead runs north and south and Ramona east and west. Immediately south of Ramona and paralleling it is the Pacific Electric Railway Company's right-of-way. Defendants, before condemnation, had driveways leading into their property at the same grade as the two streets; the property was used as a slaughterhouse and meat market. The state's project contemplated widening of Rosemead to four lanes, two of which would be in an underpass designed to eliminate the grade crossing of the railroad; the other two lanes, one on each side, were to be 30 feet wide and were designated as service roads; Ramona was to become a freeway and a like service road was to be constructed between the freeway and defendants' property. The grade of Rosemead was to be changed in such manner in connection with the underpass as to effectively block defendants' ingress and egress to and from the main highway except by using the service road to Glendon Way, some 525 feet north of Ramona, and then turning left into Rosemead. The map at page 409 of the report indicates that defendants' frontage on Rosemead was not more than half that 525-foot distance, and perhaps less. Discussing the question of whether there was an actionable interference with defendants' easement of access, the court said at page 399: "We recognize that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway. If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be

diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right. *But here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i.e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' private property rights in and to that highway are to be taken and damaged.* It is only for such private property rights that compensation has been assessed. The court allowed no damages to be predicated on any diversion of traffic from the highway but it did properly allow damages to be based on *diversion of the highway* from direct access to defendants' property." (Emphasis added.) This interference with the easement of access was recognized as a part of the severance damage (p. 401). It was further observed, at page 405, that "[n]o question of the exercise of the police power by the state is involved in this case."

The case of Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264 (undiscovered or ignored by counsel for each side of this cause), is factually on all fours with this case; a new traffic artery was inserted between plaintiff's property and Anaheim Street, upon which it had abutted. The action was inverse condemnation. In an opinion prepared by our late and revered Presiding Justice Moore this court held that there had been a compensable interference with plaintiff's easement of access, saying with respect to the Ricciardi case, *supra*, page 268: "The rationale of the decision is that there had not been a non-

compensable re-routing of traffic away from the highway abutting upon Ricciardi's property; neither was it the construction of a competing highway which siphoned off traffic that would otherwise have proceeded along the abutting highway; but on the contrary, it was a situation in which defendant's property no longer abutted upon the main highway as formerly but rather, following the construction of the underpass and the 'service roads' was removed from contact with the main highway. He no longer had access to the highway which had formerly lain immediately contiguous to his property. If the doctrine announced in the Ricciardi decision is applied to the facts now before us, it clearly applies, *a fortiori*."

While appellants at bar place their accent upon non-compensable items of alleged damage, they also insist upon an impairment of their direct access to Azusa Avenue; the Ricciardi and similar cases were and are relied upon, and the application of that doctrine is fairly presented here. Their claims of impairment by reason of the existence of the divider, diversion of northbound traffic, and consequential business losses are misplaced. But the direct access to Azusa Avenue has been destroyed in this case; the right to same is attached to the property as an easement (Rose v. State of California, *supra*, 19 Cal. 2d 713, 728); substantial impairment or destruction of same is compensable. The trial judge ruled to the contrary and that was prejudicial error.

Appellants also claim damages for temporary impairment of their access during the period of construction of the new highway. The court refused to hear evidence on the subject and this was error. Respondent's brief says at page 5: "It should first be made clear, that it is *not* plaintiff's position that there can be no compensation in

any event from temporary interference during construction. Such is simply and logically not the law. The authorities hold that such temporary interference with access, if substantial, is compensable. See, Jacobsen v. Superior Court, 192 Cal. 319, 328-329; Heimann v. City of Los Angeles, 30 Cal. 2d 746, 754-758; Lane v. San Diego Elec. Ry. Co., *supra*, 208 Cal. 29, 34; 29 C. J. S. §142, page 985.

Plaintiff's witness Hashimoto, design engineer in the Divison of Highways, testified that the construction contract calls for building of 2¼ miles of new highway within 90 days and carries a penalty clause of $300 per day; requires that one lane for traffic in both directions be maintained at all times between First and Second Streets, on the east side of present Azusa Avenue; and that access to abutting property be maintained at all times. He also said that excavation would have to be made in front of the Yor-Way property and a ramp would be constructed over it connecting the parking lot with Azusa. He had no opinion on how long the area in front of the market would be torn up. Defendants offered to show (in addition to certain non-compensable items) that this construction would take from 6 to 12 months, that the contractor probably would put plates over the excavation, narrowing the entrances to the lot, and for practical purposes access along Azusa should be considered closed. Respondent says that this is speculative and outside the plan of proposed improvement; that any such damage would be recoverable in a later action, but not this one, citing People *ex rel.* Dept. P. W. v. Schultz Co., 123 Cal. App. 2d 925, 933-934. But the Heimann case, *supra*, indicates the contrary, saying at page 757: "'Whether the contractor followed the plans or specifications or not, if plaintiffs' constitutional rights have been adversely af-

fected they are entitled to compensation from the public agency authorizing and supervising the work.' . . . The general offer was to submit 'proof which might tend to establish some elements of actionable injury. The court should have entertained such of this evidence as tended to show the alleged temporary injury; whether the alleged damage was within the contemplation of the plans and specifications for the public improvement or whether it consisted of a private act of the Works Progress Administration so separated from any purpose of the public improvement as not to constitute the damaging of private property for public use; also whether the elements of injury so shown were actionable." If perchance there is a custom of contractors to extend their 90-day limit by getting successive extensions and if they do the work in the manner suggested by counsel, appellants should have the opportunity to prove those facts. Anderson v. Hayes (Ky.), 136 S. W. 2d 558, 562, says: "There is only one measure for the damage done to land, where the injury is temporary, and that is the diminution in the value of the use of land during the period of existence of the structure, within proper limitations, or the reasonable cost of removal." Incidentally, the amount of the award was deposited in court and a final decree entered on January 28, 1959. It may be that the work has been done or is in progress and that defendants' claim as to the method pursued and time consumed in the work is now susceptible of more definite proof.

The interlocutory judgment and the final order of condemnation are reversed.

ASHBURN, *J.*

We concur:

FOX, *P. J.*

HERNDON, *J.*

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California in Bank.

The People of the State of California *ex rel.* Department of Public Works, Plaintiff and Respondent, v. Cornelius L. Ayon; as Administrator of the Estate of Cornelius Fraijo-Ayon, Deceased, *et al.*, Defendants; Yor-Way Markets (a Corporation) and E. W. Kennedy, Appellants. L. A. 25754.

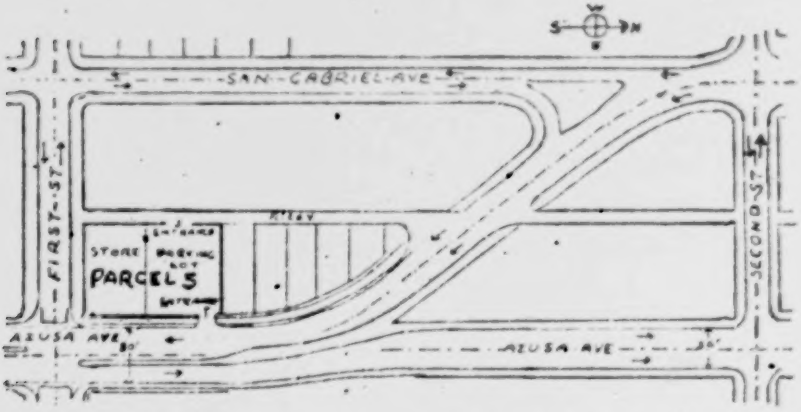
Filed May 20, 1960.

Yor-Way Markets and E. W. Kennedy appeal from a judgment fixing the damages suffered by them as a result of respondent's exercise of its power of eminent domain. The trial court awarded appellants the sum of $5,800, which is the amount that the parties stipulated was the market value of the property actually taken plus the damage to the remainder as a result of the severance. In the stipulation, the appellants reserved the right to introduce evidence of additional damage resulting from loss of business, customers and goodwill.

The trial court held that appellants had suffered no compensable damage not included in the stipulation. It rejected appellants' offer of proof relating to the claimed impairment of their right of access to the street upon which their property abutted. The court also rejected appellants' offer of proof of temporary damages which may be suffered by them during construction of the proposed street improvement.

The rulings of the trial court were correct and its judgment should be affirmed.

Appellants Kennedy and Yor-Way Markets are lessee and sublessee, respectively, of a parcel of land in the city of Azusa. This parcel, referred to as "parcel 5", is situated on the northwest corner of Azusa Avenue, which runs north and south, and First Street, which runs east and west, and has 200 feet of frontage on Azusa Avenue and 140 feet on First Street. The following diagram shows the general location of the property and of the route and nature of the improvement.



Appellants operate a supermarket and an adjoining customer parking lot on the property in question. The customers' entrance to the market is apparently from the parking lot, which is located along the northerly portion of parcel 5. Automobile entrances to the parking lot are located on Azusa Avenue and through an alley which runs along the west side of parcel 5 and intersects with First Street. A ten-foot wide strip along the entire eastern boundary of parcel 5 was condemned by respondent pursuant to a plan of street improvement and traffic relocation. The fair market value of the strip, as well as the diminution of the value of the remainder due to the severance of this strip, were agreed upon by the parties and are not involved in this dispute. But appellants contend that a new street has been interjected between parcel

5 and the street upon which it originally abutted, destroying their right of access to Azusa Avenue and the traffic which customarily travels thereon. Appellants claim that this alleged impairment of the right of access gives rise to a right to additional damages.

Before construction of the street improvement involved in this action traffic on Azusa Avenue traveled both north and south. There was no divider strip separating the traffic lanes, and customers traveling north on Azusa Avenue could make a lefthand turn into the supermarket parking lot. When the proposed change is completed this will no longer be possible. Azusa Avenue is to be widened from its original 47 feet curb-to-curb to 80 feet curb-to-curb from the corner of Azusa and First to a point north of parcel 5 (approximately midway between First Street and the next parallel street to the north, Second Street) where a new proposed connecting road will enter Azusa Avenue. This new road will connect Azusa with San Gabriel Avenue, which is parallel to Azusa and is the next intersecting street to the west.

San Gabriel Avenue is to become a southbound one-way street north of the new connecting street. South of the point of intersection of this new street and San Gabriel Avenue the latter will carry traffic in both directions. The connecting street between San Gabriel and Azusa will be a one-way street running in a southeasterly direction. A metal divider strip will be placed in the middle of Azusa from the corner to the point where this connecting street intersects with Azusa and will be linked to the western boundary of this connecting street so that automobiles entering Azusa from this street will be able to proceed in a southerly direction only. From this point south, traffic, although divided, will proceed in both directions.

From the point of intersection with the connecting street north, Azusa Avenue will only be widened to 56 feet curb-to-curb and will become a one-way street, carrying traffic north. Thus two-way traffic will not exist on Azusa north of this point of intersection.

Traffic can enter Azusa in either direction from First Street. But in order for automobiles to travel south on Azusa from a point north of parcel 5 (so that they can enter the parking lot from Azusa Avenue) they must use this new connecting street which they can enter either from San Gabriel Avenue or from the alley which parallels Azusa to the west. Customers coming from the north must either use this connecting street from San Gabriel or travel south to First Street, east on First and then turn left from First into the alley. Customers traveling from the south must either turn left on First (west) to the alley or drive north on Azusa to Second, west on Second to San Gabriel and then use the connecting street. Three way traffic lights will be constructed on Azusa, permitting left turns into First from both directions.

There can be no doubt that appellants have an easement right of direct access to Azusa Avenue which cannot be impaired by a public agency without compensation. "The courts of this state, from time immemorial and in cases too numerous to mention, have declared and enforced an abutting property owners' right to a free and convenient use of and access to the highway on which his property abuts. [Citing cases.]" (People v. Ricciardi, 23 Cal. 2d 390, 397.) But it is equally true that the right of a property owner to ingress and egress is not absolute. He cannot demand that the adjacent street be left in its original condition for all time to insure his ability to continue to enter and leave his property in the same manner as that to

which he has become accustomed. Modern transportation requirements necessitate continual improvement of streets and relocation of traffic. The property owner has no constitutional right to compensation simply because the streets upon which his property abuts are improved so as to affect the traffic flow on such streets. If loss of business or of value of the property results, that is noncompensable. It is simply a risk the property owner assumes when he lives in modern society under modern traffic conditions.

The compensable right of an abutting property owner is to direct access to the adjacent street and to the through traffic which passes along that street. (People v. Ricciardi, *supra.*) If this basic right is not adversely affected, a public agency may enact and enforce reasonable and proper traffic regulations without the payment of compensation although such regulations may impede the convenience with which ingress and egress may thereafter be accomplished, and may necessitate circuity of travel to reach a given destination. "In the proper exercise of its police power in the regulation of traffic, a state or county may do many things which are not compensable to an abutting property owner, such as constructing a traffic island, placing permanent dividing strips which deprive an abutter of direct access to the opposite side of the highway, painting double white lines on the highway, or designating the entire street as a one-way street. (McDonald v. State, 130 Cal. App. 2d 793, 799 [279 P. 2d 777]; People v. Sayig, 101 Cal. App. 2d 890 [226 P. 2d 702]; Holman v. State, 97 Cal. App. 2d 237 [217 P. 2d 448]; Beckham v. City of Stockton, 64 Cal. App. 2d 487 [149 P. 2d 290].)" (People v. Russell, 48 Cal. 2d 189, 197.) The Russell case held that the use of a parkway as a traffic separation strip between a state highway and a county road was a noncompensable traffic regulation.

Under these well-settled rules the appellants are not entitled to compensation because of the divider strip placed in the middle of Azusa. They have direct access to that street and to traffic traveling in one direction on that street. (See particularly People v. Sayig, *supra*; Holman v. State of California, *supra*.) Nor can appellants complain because the relocation plan will divert some southbound traffic from Azusa in front of appellants' property. A property owner has no right to compensation because traffic is rerouted or diverted to another thoroughfare even though the value of his property is substantially diminished as a result. (People v. Russell, *supra*; People v. Ricciardi, *supra*; People v. Sayig, *supra*; Holman v. State of California, *supra*.)

In an attempt to avoid the application of these well-settled rules appellants cite People v. Ricciardi, *supra*, and Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264. Those cases are clearly distinguishable. In Ricciardi this court held that a street improvement which results in rerouting the highway itself in relation to the property which originally abutted upon it, rather than merely rerouting traffic from the highway, thus destroying any direct access to through traffic, entitles abutting owners to compensation. In that case the condemnees owned corner property at the intersection of Rosemead and Ramona Boulevards. Direct access to both intersecting boulevards existed. A strip of land was condemned and Rosemead Boulevard was widened to consist of four lanes, two in an underpass and a service lane on each side of the underpass. Rosemead Boulevard passed under Ramona Boulevard in such a manner that the condemnees' property was entirely cut off from the main stream of traffic. The only direct access that remained was to the service roads.

Through traffic in *either* direction could reach the property in question only by detouring to one of the service roads. These roads could be reached from the through traffic lanes only at points considerably to the north or south of this property. Departing traffic could reach the through lanes in either direction only by first traveling along a service road until it joined with the through traffic.

The factual situation involved in Blumenstein v. City of Long Beach, *supra*, was somewhat similar. That case involved the construction of a freeway outlet between Blumenstein's property and Anaheim Street upon which Blumenstein's property had originally abutted. The new freeway outlet passed directly in front of the property, separating it from traffic (two-way) on Anaheim Street by a concrete construction approximately five feet wide. Traffic proceeding along the freeway outlet (three lanes of one-way traffic traveling west) merged with that on Anaheim Street at Harbor Avenue, the first intersecting street west of Blumenstein's property. The court held that the new freeway outlet could not be considered as the addition of lanes to Anaheim because it emptied its traffic into Anaheim at a point west of Blumenstein's property while the other end of the outlet connected with the freeway, not Anaheim Street. Thus Anaheim had been diverted from its abutting property, entitling owners thereof to compensation.

In each of these cases through traffic continued to travel along the street upon which the owner's property had originally abutted. But after construction of the improvement the properties involved no longer abutted on any through traffic street. As a result of the improvement they were separated from through traffic by a new street

which did not carry through traffic in either direction. (*cf.* McDonald v. State of California, 130 Cal. App. 2d 793). In the case at bar there is no new street between parcel 5 and Azusa Avenue. Azusa has simply been widened and then connected, in part, to a new street to facilitate the flow of traffic. Through southbound traffic will continue to pass along the lanes abutting parcel 5.

It is immaterial that this southbound traffic comes from the new connecting street rather than traveling along the entire distance of Azusa. The connecting street will carry all through traffic which intends to travel south on Azusa. Through southbound traffic will travel along Azusa without interruption from the point of intersection of this connecting street and Azusa. Unlike Ricciardi, direct access to through traffic in one direction still exists. Unlike Blumenstein, all through southbound traffic on Azusa passes directly in front of parcel 5; the connecting street (carrying *through* traffic, not freeway outlet traffic) merges with Azusa at a point north of parcel 5, not at a point beyond. Appellants cannot complain that through southbound traffic must now travel a more circuitous route so long as direct access to through traffic on Azusa traveling in at least one direction continues to exist.

Appellants' offer of proof in the court below, as well as the reservation in the stipulation which preserved their right to offer evidence "concerning purported elements of damage involving loss of business, customers and good will," indicates that they are actually attempting to recover damages for injury to their business which may result from this street improvement. The trial court correctly ruled that the items reserved in the stipulation are noncompensable. (Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392.) "A particular business might be entirely

destroyed and yet not diminish the actual value of the property for its highest and best use." (People v. Ricciardi, 23 Cal. 2d at p. 396; City of Los Angeles v. Geiger, 94 Cal. App. 2d 180.) Moreover, the location of the alley on the west boundary of parcel 5, which leads directly into the parking lot, greatly mitigates any inconvenience to appellants' customers. Under the circumstances here presented the right of direct access from parcel 5 to Azusa has not been substantially impaired and appellants are not entitled to additional damages.

It should be mentioned that even if appellants were entitled to damages for impairment of their right of access, these damages were apparently included in the amount stipulated to by the parties. The stipulated sum of $5,800 covered "the fair market value of Parcel 5 together with all improvements thereon and the severance damage to the remainder by reason of the taking of Parcel 5 and the construction of the improvement in the manner proposed . . ."[1]

Appellants also offered to show that the improvement could be constructed in a manner which would be more convenient for them and which would cause less loss to their business. They suggested to the trial court that respondent could, and should, leave an opening in the divider strip so that northbound traffic on Azusa could continue

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[1]Although the stipulation refers to the "Taking of Parcel 5" it is obvious that the parties were referring only to that portion of parcel 5 which was actually condemned.

The term "severance damages" has been used by both the court and counsel to refer to impairment of the right of access as well as to injury to the remainder resulting from severance of a portion of the property. It is probable that the parties intended the term to have this meaning in the stipulation. However, technically the term means only that damage caused to the remainder due to actual severance.

to enter the parking lot directly from Azusa. They also suggested that a traffic light should be installed at the crosswalk which is to be located near the parking lot entrance. This evidence would have been irrelevant. The convenience of an individual is not the test of the propriety of a police regulation. Police powers are exercised for the welfare of the public as a whole. Traffic regulation is a function of government for the benefit of the public, not for the benefit and to meet the convenience of an individual property owner. The Department of Public Works has promulgated a reasonable largescale plan for street improvement to facilitate the flow of traffic. Appellants cannot complain, legally, because they would have preferred that the improvement be constructed in a different manner.

Appellants further contend that the trial court erred in rejecting their offer of proof of injury which may result during the period of construction. The improvement has not yet been constructed, but respondent has fully set forth how the improvement is to be constructed. Appellants offered to prove by expert testimony that the improvement cannot be constructed in the time estimated by respondent. Under respondent's proposed construction plan Azusa Avenue will be torn up in the area of parcel 5 for approximately 90 days. One lane of southbound traffic is to remain open at all times, and direct access from this lane to the parkling lot on parcel 5 is guaranteed. Appellants offered to prove that this construction could not be done in 90 days but would take from 6 to 12 months, and that the contractor probably would put plates over the excavation, narrowing the entrances to the lot, so that for practical purposes access from Azusa will not be possible. They contend that this actual process of construc-

tion will cause them to suffer additional damage for which they should be compensated.

Temporary injury resulting from actual construction of public improvements is generally noncompensable. Personal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries. (Heimann v. City of Los Angeles, 30 Cal. 2d 746; Eachus v. Los Angeles etc. Ry. Co., 103 Cal. 614; Beckham v. City of Stockton, 64 Cal. App. 2d 487.) "It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement." (Heimann v. City of Los Angeles, *supra*, 30 Cal. 2d at p. 755.) Appellants are not entitled to compensation for temporary interference with their right of access, provided such interference is not unreasonable, that is occasioned by actual construction work. It is often necessary to break up pavement, narrow streets and provide inconvenient modes of ingress and egress to abutting property during the time streets are being repaired or improved. Such reasonable and temporary interference with the property owner's right of access is noncompensable.

It is true that damages resulting from unnecessary and substantial temporary interference with the property owner's rights in the property may be compensable. Thus, in Heimann v. City of Los Angeles, *supra*, 30 Cal. 2d 746, 755, it was stated to be the rule that "unnecessary and substantial temporary interference with such property rights or an actual though temporary invasion of the right of possession of private property during construction" is compensable. (See also Jacobsen v. Superior Court, 192

Cal. 319, 328; Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 34.) This would, of course, include additional unnecessary and substantial damage caused by reason of the improvement not being constructed as originally planned.

But such damages cannot be recovered until they have occurred. They may never occur. Until they have occurred such damages are purely speculative, and, as was held in People *ex rel.* Dept. P. W. v. Schultz Co., 123 Cal. App. 2d 925, 935, "[r]emote, speculative, or conjectural elements of damage cannot be submitted to or considered by the jury."

While the general rule is that, in condemnation actions, the damages should be fixed once and for all at the time of the main trial, that rule is not inflexible. A condemnation award is based on the assumption that the improvement will be carried out as proposed (People *ex rel.* Dept. P. W. v. Schultz Co., *supra*, 123 Cal. App. 2d at p. 934). When the condemnation action is tried before the improvement is constructed, and substantial although temporary interference with the property owner's rights of possession or access occurs during construction, the property owner may maintain a subsequent action for such damage occurring during construction. (People *ex rel.* Dept. P. W. v. Schultz Co., *supra*; People v. Adamson, 118 Cal. App. 2d 714.) As applied to the instant case, this means that if the improvement is not carried out as proposed, and, if as a result, unnecessary or unreasonable interference with appellants' rights of possession or access occurs, then they may bring an action for such damages after they have occurred. But such damages cannot be recovered before they have occurred, for the obvious reason that they may never occur. Appellants sought to prove that the improvement cannot be constructed in the manner and time proposed,

and that, as a result, unreasonable damage will occur. Such possible damages are too speculative to be recoverable in this action. Of course, any compensable damages caused by the improvement as proposed were necessarily included in the stipulation fixing damages as they then existed. The improvement has not yet been constructed. Whether or not there will be any further and improper interference with appellants' rights at this time is uncertain and highly conjectural. If unreasonable interference does occur during construction that was not included in the award, damages may be recovered in a subsequent action, but no cause of action for such temporary damages can arise until it can be ascertained that a compensable injury has occurred. Thus, the trial court correctly held that evidence as to speculative temporary damages resulting from an alleged, and equally speculative, deviation from the proposed plan could not be introduced before construction work had commenced. Appellants' offers of proof were properly rejected by the trial court.

The judgment is affirmed.

PETERS, *J.*

We concur:

GIBSON, *C.J.*
TRAYNOR, *J.*
SCHAUER, *J.*
WHITE, *J.*
DOOLING, *J. Pro tem.*

DISSENTING OPINION

I dissent. I would reverse the judgment for the reasons expressed by Mr. Justice Ashburn in the opinion prepared by him for the District Court of Appeal in People v. Ayon (Yor-Way Markets), 176 A.C.A. 76, 1 Cal. Rptr. 107.

McCOMB, *J.*

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EXH

SAN GABRIEL AVE.

Parcel 5

ALLEY

SECOND ST

AZUSA AVE

BEFORE CONSTRUCTION
PEOPLE VS
AYON et al
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IN THE

Supreme Court of the United States

October Term, 1960

No. .....

YOR-WAY MARKETS, a corporation, and E. W. KENNEDY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF PUBLIC WORKS,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

To the Honorable Supreme Court of the United States:

The above-named respondent respectfully prays that a Writ of Certiorari requested by petitioners in the above-entitled case not issue.

I.

Partial Restatement of the Case.

The general statement of the case is substantially correct. There are two items which should be restated.

The connecting road connects San Gabriel Avenue and Azusa Avenue and ends north of the Petitioner's

property. [Ex. B in Petition for Writ of Certiorari.] As stated by the Supreme Court of the State of California:[1]

> "*Azusa Avenue* is to be widened from its original 47 feet curb-to-curb to 80 feet curb-to-curb from the corner of Azusa and First to a point *north* of parcel 5 (approximately midway between First Street and the next parallel street to the north, Second Street) where a new proposed connecting road *will enter Azusa Avenue*." (Emphasis added.)

The Petitioners and the Respondent stipulated to the value of the part taken and the severance damages to the remainder by reason of the taking and the construction of the improvement in the manner proposed. The only items excluded were loss of business, good will and customers. [Clk. Tr. p. 58.]

II.

Reasons for Not Granting Petition.

One of the bases for the decision by the Supreme Court of the State of California was that the damages to any impairment of access (had there been any) were included in the amount stipulated to by the parties.[2] The stipulation included all diminution in *market value*

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[1] 54 A. C. 210, 215, 352 P. 2d 519, 522; Petition for Writ of Certiorari, Opinion of California Supreme Court, Appendix, page 26.

[2] *People v. Ayon*, 54 A. C. 210, 219, 352 P. 2d 519, 524; Petition for Writ of Certiorari, Appendix, page 32.

of the property—the standard concept of "just compensation."[3]

This Honorable Court has held that it will not review a State Court decision where the State Court's decision rests on an adequate and independent non-federal ground.[4] Here, the situation is within the meaning of this rule where the petitioners were held to have stipulated to the amount of damages arising from the alleged impairment of access.

It should also be noted that there is no claim to a total deprivation of access but only the deprivation of access from traffic traveling in one direction—access is maintained in one direction.[5]

In the cases cited by petitioners in regard to access the problems presented involved cases where there was a total deprivation of access.[6] Here, the petitioners still have direct access to the adjacent street.

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[3]*United States v. General Motors Corp.*, 323 U. S. 373, 379, 65 S. Ct. 357, 360, 89 L. Ed. 311, 319, 156 A. L. R. 390, 394.

[4]*Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092.

[5]See Question Presented for Review, Petition for Writ of Certiorari, page 3.

[6]*Martin v. Creasy*, 360 U. S. 219, 79 S. Ct. 1034; *Schiefelbein v. United States* (1942), 124 F. 2d 945; *Union Electric Light & Power Co. v. Snyder Estate Co.* (1933), 65 F. 2d 297; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192, involving regulations of cabbies in front of railroad station.

III.
Conclusion.

Respondent respectfully prays that the Petition for a Writ of Certiorari to the Supreme Court of the State of California be denied.

Respectfully submitted,

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Attorneys for Respondent.

GEORGE C. HADLEY,

CHARLES E. SPENCER, JR.,

Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 263

YOU-WAY MARKETS, a corporation, and E. W. KENNEDY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Respondent.

PETITIONERS' REPLY BRIEF.

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Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Respondent.

PETITIONERS' REPLY BRIEF.

I.

There Is No Adequate and Substantial Non-Federal Ground.

An examination of the opinion of the California Supreme Court will show that the Court exhaustively considered and discussed the federal ground of denial of access (Appx. pp. 27-32), but treated the so-called non-federal ground in one short paragraph.[1] It should also be noted that the California Supreme Court does not

[1]Appendix, page 32.

even base any part of its decision on the stipulation, but in a rather off-hand way states:

> "It should be mentioned that even if appellants were entitled to damages for impairment of their right of access, these damages were *apparently* included in the amount stipulated to by the parties."[2] (Emphasis added.)

The Court, it can be seen, does not base any decision on that ground, but states in effect that "apparently" it might do so.

This should be compared with the decision of the California Appellate Court in which the specific question of the effect of the stipulation was passed upon. That Appellate Court, after giving the matter careful consideration, specifically held that the stipulation did not include this matter of denial of right of access.[3]

This Court has held on numerous occasions that before it will be ousted of jurisdiction, the state court decision must be based on an adequate and substantial non-federal ground.[4] Certainly, the cursory treatment of the stipulation by the State Supreme Court could not be an adequate and substantial ground on which to base such an important decision. Moreover, this Court has held

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[2] Appendix, page 32

[3] Appendix, pages 14 and 15.

[4] *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276 at 282, 52 S. Ct. 556, 76 L. Ed. 1102; *Broad River Power Co. v. State of South Carolina*, 281 U. S. 537 at 539, 50 S. Ct. 401, 74 L. Ed. 1023; *State v. Brand*, 303 U. S. 95 at 98 and 99, 58 S. Ct. 443, 82 L. Ed. 685; *Abie State Bank v. Weaver*, 282 U. S. 765 at 773, 51 S. Ct. 252, 75 L. Ed. 690; *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651 at 653, 47 S. Ct. 669, 71 L. Ed. 1279.

that whether a decision is based on a non-federal ground is itself a federal question.[5] This Court should grant certiorari for the many reasons set out in the Petition, and on a full hearing can see that this entire matter was tried, as the California Appellate Court states,[6] on the basis that the question of damage to the right of access had been reserved by the stipulation, and was being decided.

Conclusion.

In this case the California Supreme Court based its decision on the question of right of access. Right of access is a property right and petitioners are entitled to damages. As pointed out in the petition, this extremely important question of access to highways should be reviewed by this Court, and the instant case is excellently suited for that purpose.

Respectfully submitted,

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[5] *Lovell v. City of Griffin, Ga.*, 303 U. S. 444 at 450 and 452, 58 S. Ct. 666, 82 L. Ed. 949.

[6] Appendix, page 15.